

83-313

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ADAM EUGENE LITTLE Petitioner

versus

COMMONWEALTH OF KENTUCKY Respondent

Petition on Writ of Certiorari to the Court of Appeals
of the Commonwealth of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the 14th Amendment Due Process Clause protection of the reasonable doubt standard established by *In re Winship*, 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 268 (1970) and *Jackson v. Virginia*, 443 U. S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), was there sufficient probative evidence to impress upon a rational trier of facts a subjective state of near certitude of the identification of the Petitioner as a ski-masked robber based on witnesses testimony identifying Petitioner solely by physique and voice?

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IN THE

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No.

October Term, 1983

ADAM EUGENE LITTLE - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

*To the Chief Justice and Associate Justices of the
Supreme Court of the United States:*

Your Petitioner, Adam Eugene Little, hereby petitions for a Writ of Certiorari to review the decision of the Court of Appeals of Kentucky refusing to reverse his conviction of Robbery based on the Petitioner's ground that the identification evidence was insufficient to satisfy the reasonable doubt standard established by *In re Winship*, 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 268 (1970) and *Jackson v. Virginia*, 443 U. S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

OPINION BELOW

The opinion of the Court of Appeals of Kentucky is appended hereto as Appendix A, and is an unpublished opinion.

JURISDICTION

The order and final judgment sought to be reviewed was decided by the Court of Appeals of Kentucky on 25 March, 1983 (Appendix A). The Supreme Court of Kentucky denied discretionary review on 29 June, 1983 (Appendix B). The statutory provision believed to confer this Court's jurisdiction to review the final order and judgment in question is 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment, XIV, Section I, United States Constitution:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*”

STATEMENT OF THE CASE

On the 4th of March, 1981, at approximately 9:40 p.m., Peggy Keeling and Sheila Wise Hacker, while working at a small food market, were approached by ski-masked man who demanded money. Ms. Keeling opened the cash register and put money into a bag. The ski-masked man fled on foot.

The description of the ski-masked man was a white male, early 30's, 5'10" to 5'11", muscular build, and dark brown, curly hair. He was wearing a blue wind breaker, brown pants, brown jersey gloves and a dark blue toboggan with holes cut out for the eyes which covers his entire face and head.

Ms. Hacker gave the police the name of the Petitioner, because it was her belief that the ski-masked man resembled him by physique and movements based on her acquaintance with him. Ms. Keeling stated to the police that she believed the ski-masked man resembled a customer based on his physique and voice and subsequently identified a photograph of the Petitioner as the customer she associated with the ski-masked man.

The Petitioner was arrested 18 days later.

A jury trial began on the 24th of March, 1983, and ended on the same day. The in-Court identification by the two women was the only evidence linking the Petitioner with the crime. Ms. Hacker's identification was based on the physique and movements which she associated with the Petitioner basing her opinion on occasional social contacts and customer contacts with him. Ms. Keeling based her identification on physique and voice stating her ability to identify the Petitioner was based on the fact that the Petitioner was an occasional customer.

No other evidence, such as the mask, the money, the clothing, other eye witnesses or statements from the Petitioner, was presented which linked the Petitioner

to the crime. The police did not conduct a post-arrest identification procedure to test the prosecuting witnesses reliability to identify the physique and voice of the Petitioner as that of the ski-masked man.

The Petitioner presented an alibi defense through the testimony of three witnesses and the Petitioner did not testify.

The jury returned a verdict of guilty of robbery in the second degree and fixed punishment at confinement in the penitentiary for five years.

The Petitioner appealed his conviction to the Court of Appeals of Kentucky on the ground that the evidence was insufficient to justify a rational trier of fact to find beyond a reasonable doubt that the Petitioner was the perpetrator of the crime denying him the protection of due process under the Fourteenth Amendment to the United States Constitution established by *In re Winship, supra*, and *Jackson v. Virginia, supra*.

On the 2nd of March, 1983, the Court of Appeals of Kentucky rendered its opinion affirming the conviction holding that the evidence was sufficient to support the verdict under the standards set forth in *Jackson v. Virginia, supra*. (Opinion Court of Appeals of Kentucky, Appendix A).

The Petitioner timely sought discretionary review by the Supreme Court of Kentucky and was denied such review of the 29th of June, 1983. (Order Supreme Court of Kentucky, Appendix B).

The Petitioner timely filed a motion to stay execution and enforcement of order pending application to

the Supreme Court of the United States for writ of certiorari with the Court of Appeals of Kentucky. Said motion was granted on the 5th of August, 1983. (Order Court of Appeals of Kentucky, Appendix C).

It is from the opinion from the Court of Appeals of Kentucky that the Petitioner seeks review by this Court.

REASON FOR GRANTING WRIT

The identification of the Petitioner as the ski-masked robber by witnesses, who had but limited acquaintance with the Petitioner, based solely on physique and voice was not sufficient probative evidence to justify a rational trier of facts applying the constitutional standard of reasonable doubt established by *In re Winship, supra*, and *Jackson v. Virginia, supra*, to find guilt; thereby denying Petitioner's fundamental protection of due process.

An accused cannot be convicted of a crime where no rational trier of fact could find proof of guilt beyond a reasonable doubt. This constitutional standard for the prosecution's burden of proof has been established by *In re Winship, supra*, and reaffirmed in *Jackson v. Virginia, supra*, which held the due process of the Fourteenth Amendment protects a person against conviction except upon proof beyond a reasonable doubt. The standard of proof beyond a reasonable doubt is to be impressed upon the fact finder as "the need to reach a subjective state of near certitude of the guilt of the accused". *Jackson v. Virginia, supra*, 443 U. S. at 315, 61 L. Ed. 2d at 571 and *In re Winship, supra*, 397 U. S. at 364, 25 L. Ed. 2d at 375.

This Court in *Jackson v. Virginia, supra*, recognized the need for safeguarding the misapplication of the constitutional standard of reasonable doubt by the trier of facts:

A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence . . . yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt . . . *Jackson v. Virginia, supra*, 443 U. S. at 317, 61 L. Ed. 2d at 572.

* * *

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether, after reviewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt . . . the criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law. *Jackson v. Virginia, supra*, 443 U. S. at 381, 61 L. Ed. 2d at 573.

The prosecution's entire case against the Petitioner was the witnesses' identification and improper comments by the prosecutor and witnesses of extraneous circumstances, such as the Petitioner failed to speak in his defense, he may have fled the jurisdiction to avoid capture, and conduct of people the Petitioner as-

sociated with, all designed to draw harmful inferences to establish the Petitioner's guilt. These comments were similar to the references and comments which this Court found harmful in the case of *Taylor v. Kentucky*, 436 U. S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

The prosecution's sole evidence was the mere expression of opinion or belief by witnesses that the ski-masked man was or resembled the Petitioner by physique and voice. These opinions or beliefs were based on the witnesses limited contact with the Petitioner.

The witnesses gave a general description of the masked man, the police arrested the Petitioner 18 days later and no post-arrest identification procedure was performed by the police to test the reliability of the witnesses belief.

The witnesses did not and were unable to articulate or demonstratae a particular unique characteristic of the Petitioner's physique, body movement or appearance which enabled them to make an identification.

Only Ms. Keeling testified that she recognized the masked man's voice. However, she was unable to describe any quality or unique characteristics of the voice which enabled her to identify it as the Petitioner's.

The Petitioner cited cases in his brief to the Court of Appeals of Kentucky recognizing the use of opinion evidence of identification by means of build, size, stance and voice may be competent under certain cir-

cumstances. *Hogan v. Commonwealth*, Ky., 280 S. W. 104 (1926), *Fry v. Commonwealth*, Ky., 82 S. W. 2d 431 (1935) and *Brown v. Commonwealth*, Ky., 220 S. W. 2d 870 (1949). The Court of Appeals of Kentucky in its opinion cited an additional case of *Teer v. Commonwealth*, Ky., 212 S. W. 2d 106 (1948) which held that a witness who shows himself competent, may give an opinion as to a person's identify. However, none of these cases in their factual context sustained a defendant's conviction based on identification testimony of physique alone or by voice alone or by physique and voice alone.

In *Reamer v. United States*, 229 F. 2d 884 (Sixth Circuit, 1956) two bank tellers identified the accused as one of the masked bank robbers at a post-arrest line up by his appearance and voice. The Sixth Circuit Court of Appeals held:

The evidence of the tellers was admissible and we express no view as to the propriety of the technique employed. However, the identification is uncorroborated by any other circumstances and is so pregnant with danger of honest mistake that it fails to qualify as dependable substantial proof that the appellant was one of the bank robbers. *Reamer v. United States, supra*, at 886.

The identification by physique and voice alone by witnesses who had but limited association or contact with the accused is not sufficient probative evidence standing alone to justify a rational trier of facts applying the constitutional standard of reasonable doubt established by *In re Winship, supra*, and *Jackson*

v. *Virginia, supra*, to impress upon the fact finders "a subjective state of near certitude of the guilt of the accused". *Jackson v. Virginia, supra*, 443 U. S. at 315, 61 L. Ed. 2d at 571.

CONCLUSION

The Petitioner submits the identification evidence presented by the prosecution was insufficient to justify a rational trier of facts to find beyond a reasonable doubt the guilt of the Petitioner. This Court should grant certiorari to correct the misapplication of the reasonable doubt standard established by *In re Winship, supra*, and *Jackson v. Virginia, supra* and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

OPINION RENDERED: MARCH 25, 1983; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 82-CA-1750-MR

ADAM EUGENE LITTLE - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Appellee*

*Appeal from Jefferson Circuit Court
Honorable George B. Ryan, Judge
Action No. 81-CR-0861*

AFFIRMING

BEFORE: HOGGE, PAXTON and WILHOIT, Judges.

HOGGE, JUDGE. Adam Eugene Little was found guilty of robbery in the second degree subsequent to a hold-up at the Zippy Food Mart in Louisville, Kentucky. Little's five-year sentence was enhanced to ten years as a result of being found to be a persistent felony offender in the second degree. The sole issue on this appeal is the sufficiency of the evidence.

The principal witnesses at the trial were Peggy Keeling and Sheila Wise Hacker, two clerks at the market. Both testified that they recognized the robber, who wore a toboggan over his head with holes cut out for the eyes, as being a customer of the store. Sheila Hacker also recognized Little as someone she had met at parties. The appellant contends that there was insufficient evidence to identify him as the perpetrator of the offense and to prove that

he threatened the immediate use of physical force. KRS 515.030.

Peggy Keeling testified that during the incident in question, the perpetrator "put his hand in his pocket, he had it pointed out like he had a gun." He said, "give me all your money." Peggy asked if he was kidding, to which he responded "No." He then "walked over to the counter and he said 'I said, give me all your money'." She opened the register and started putting money in a bag. The robber grabbed the money on top of the silent alarm, and demanded the extra money kept under the counter. He then fled out the door.

Peggy Keeling stated that she recognized the appellant, who was about a foot away from her, by the way he was built and the way he stood, "because his shoulders are sort of like that, and his voice was so familiar and his hair, the way it stuck out underneath the toboggan back here, the way it was so curly and everything, and the color of it." She stated that the appellant was a regular customer, having been in the store several times.

Sheila Hacker's testimony corroborated that of Peggy Keeling as to the manner in which the robbery took place. She also testified that he was moving his hand around in his pocket as if he had a gun. She stated that Peggy got nervous when she realized the appellant wasn't kidding. Sheila stated that she (Sheila) did not know if he had a gun but "wasn't going to chance it." Sheila stated that she knew the appellant from his build, his walk, his actions and the color of his eyes. Sheila testified that her brother is acquainted with the appellant and that she had gone to parties where the appellant was present and had talked with him. She had also seen him in the store.

Witnesses for the appellant testified that they had been playing cards with him at the time the crime occurred. The question which we must ask in order to determine

whether the evidence was sufficient to support the conviction is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U. S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). It is clear from the evidence which we have set forth that this standard has been met.

Evidence of identification by means of voice, build, size, and stance is as appellant admits, admissible, and it may be used as proof. *Brown v. Commonwealth*, 310 Ky. 306, 220 S. W. 2d 870 (1949). In examining the cases cited by the appellant, we find no statement that such identification evidence must be accompanied by other corroborating evidence in order for the conviction to stand. In *Teir v. Commonwealth*, 307 Ky. 602, 212 S. W. 2d 106 (1948) it was held that identity may be sufficiently established by the mere sound of the human voice. A rational trier of fact could have found beyond a reasonable doubt that the appellant was the man who robbed the Zippy Food Mart on the basis of the identification testimony presented in this case. We have also concluded that there is sufficient evidence on which a rational trier of fact could conclude, beyond a reasonable doubt (based on appellant's actions indicating that he had a gun together with his statements and conduct in obtaining the money) that he threatened the immediate use of force. We hold that the evidence was sufficient to support the verdict under the standards set forth in *Jackson, supra*, and *Trowel v. Commonwealth*, Ky., 550 S. W. 2d 530 (1977).

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY

**83-SC-291-D
(82-CA-1750-MR)**

ADAM EUGENE LITTLE - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Respondent*

*Jefferson Circuit Court
#81-CR-0861*

**ORDER DENYING MOTION FOR
DISCRETIONARY REVIEW**

The motion of Adam Eugene Little for a review of the decision of the Court of Appeals is denied.

ENTERED June 29, 1983.

(s) Robert F. Stephens
Chief Justice

COURT OF APPEALS OF KENTUCKY
No. 82-CA-1750-MR

ADAM EUGENE LITTLE - - - - - *Appellant*
v.

COMMONWEALTH OF KENTUCKY - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Action No. 81-CR-0561

ORDER

BEFORE: HOGGE, PAXTON, and WILHOIT, JUDGES.

The Court, having considered appellant's motion pursuant to CR 76.44 to stay the execution or enforcement of the opinion rendered by this Court on March 25, 1983, which became final on June 29, 1983, there being no objection by the Commonwealth, and having been otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, GRANTED. The enforcement of the decision of this Court is hereby STAYED for a period of ninety (90) days from June 29, 1983, the date when the Kentucky Supreme Court entered an order denying appellant's motion for discretionary review.

No further relief is available from this Court, in accordance with the Kentucky Rules of Court, but must be sought from the United States Supreme Court, pursuant to Supreme Court Rule 27.

ENTERED: 8-5-83

(s) E. M. Hogge

Chief Judge Pro Tem
Court of Appeals of Kentucky
PAXTON, JUDGE, DISSENTS